SUPREME COURT, U. S.

In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1968

No. 875

ARMEMENT DEPPE, S.A.; COMPAGNIE MARITIME BELGE (LLOYD ROYAL), S.A.; COMPAGNIE GENERALE TRANSATLANTIQUE; HAMBURG AMERIKA LINIE; NORDDEUTSCHER LLOYD; OZEAN/STINNES LINIEN; N.V. NEDERLANDISCHE-AMERIKAANSCHE STOOMVART-MAATSCHAPPIJ "HOLLAND-AMERICA LIJN"; SVENSKA AMERICA LINIEN; and WILHELMSEN LINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

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Petitioners Armement Deppe, S.A., Compagnie Maritime Belge (Lloyd Royal), S.A., Compagnie Generale

Transatlantique, Hamburg Amerika Linie, Norddeutscher Lloyd, Ozean/Stinnes Linien, N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij "Holland-America Lijn," Svenska America Linien, and Wilhelmsen Line, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 8, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 399 F.2d 794. The opinion of the District Court on petitioners' motion for dismissal and its opinion on reconsideration are unreported. The three decisions are attached hereto as Appendices A through C, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered August 8, 1968. An extension of time to file this petition was granted on October 25, 1968, extending the permissible time for filing to and including December 23, 1968 (Appendix D). The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code.

QUESTION PRESENTED

May foreign shipping companies be penalized up to $1,000 per day under a U.S. regulatory statute (46 U.S.C. 813a and 814) for their performance of commercial con-

tracts abroad that were admittedly lawful and enforceable where executed and performed and that had no reprehensible effect in the United States?

STATEMENT OF THE CASE

This Court held in 1958 that a particular "dual-rate contract" between steamship lines in a conference and commercial shippers (exporters) calling for the latter's exclusive patronage would violate Section 14 of the U.S. Shipping Act.[1] Congress immediately suspended the effect of the Court's decision by interim legislation[2] and, in 1961, enacted a permanent amendment to Section 14 of the Shipping Act reversing the Court's decision.[3] The Congress acted upon an express finding that such contracts are universal in international trade and are beneficial to American exporters and importers as well as to the steamship lines, saying:

> "In order for the ocean common carriers and conferences serving our foreign commerce to do so on a regular, dependable, and nondiscriminatory basis, they must be allowed, as they are throughout the rest of the maritime world, to enter into dual-rate contracts with shippers and consignees. Otherwise, the economics of ocean shipping will force the lines concerned into rate wars among themselves that might result in the destruction of ocean common carriage. If that happens, there can be no doubt that the high cost American lines will be the hardest hit."

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[1] *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

[2] P.L. 85-626 (72 Stat. 574), extended by P.L. 86-542 (74 Stat. 253) and again by P.L. 87-75 (75 Stat. 195).

[3] P.L. 87-346 (75 Stat. 762), 46 U.S.C. 813a.

"Steamship Conferences and Dual Rate Contracts", Sen. Rep. No. 860, 87th Cong., 1st Sess., 10 (1961).

The 1961 amendment included required contract provisions which had been requested by American exporters and importers in the legislative hearings preceding enactment and found by the Congressional Committees to be deemed necessary for the "protection of American exporters and importers."[4] The amendment declared all existing contracts unlawful after April 3, 1962, unless modified to include the terms prescribed in the statute.

Petitioners were parties to thousands of contracts with exporters in Continental Europe and Scandinavia, executed before the statutory amendment was enacted and lawful and enforceable abroad according to their terms for the contract period of one year, which extended beyond April 3, 1962. Such contracts did not contain all of the terms prescribed in the American statute and could not have been amended by the unilateral action of Petitioners prior to the expiratory date in the contracts, December 31, 1962.[5] Under a threat by the United States to impose heavy penalties if their contracts were not amended by April 3, 1962, and unable to amend their contracts by that date under the laws of their respective domiciliary nations abroad, Petitioners dissolved their conference on August 15, 1962, as their only viable alternative. The government's complaint in the District Court for the Eastern District of Louisiana was served upon

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[4]"Steamship Conferences and Dual Rate Contracts," Sen. Rep. No. 860, 87th Cong., 1st Sess., 11 (1961).

[5]See Appendix E hereto [reproduced in the Joint Appendix ("JA") at pp. 122-130].

agents representing Petitioners at New Orleans on or about October 10, 1963, demanding a maximum penalty from each petitioner of $133,000.00, i.e., up to $1,000 per day from April 4, 1962, to August 15, 1962.

Petitioners' motion to dismiss on the ground that the U.S. lacks jurisdiction to prescribe the only lawful terms of their contracts abroad with European shippers was denied by the District Court on June 29, 1964, on the ground that there was no showing that

> ". . . movers contracted *only* with foreign shippers or that *all* of such contracts were executed outside the territorial limits of the United States." (emphasis in original) [JA p. 132].

By affidavit [JA pp. 146-148], Petitioners attempted to show that all contracts had been executed abroad and that all contracting shippers were foreign shippers. The affidavit noted that some of the contracting shippers were American companies, engaged, however, in the exporting business in Europe, and therefore European exporters or shippers, not American. The District Court, however, again denied the motion, saying:

> ". . . The mere fact that American shippers contracted in European ports, and the contracts covered only European products, would not change the American shippers into European shippers in their relation with the Conference. . . ." [JA pp. 150-151]

Instead of petitioning for reconsideration a second time to show the obvious error in the District Court's assumption that American companies are necessarily and always "American shippers," Petitioners sought and obtained review in the Court of Appeals under 28 U.S.C. 1292(b).

The Court of Appeals granted review and ultimately affirmed the District Court's conclusion, but on an entirely new and different legal basis. The Court of Appeals recognized that all of Petitioners' contracts were executed abroad and that all contracting shippers who shipped merchandise from Europe to the United States were European shippers regardless of their nationality. The Court nevertheless held the contracts to be governed by the U.S. Shipping Act and to have been rendered unlawful on April 4, 1962, under section 14b of the Act.

The Court of Appeals' decision rests primarily upon that Court's supposition that Petitioners' "dual-rate contracts" included within their coverage:

> ". . . the delivery of goods to American ports . . . ,"

from which pivotal determination the Court found that:

> "Consummation of the contracts is, therefore, by acts which are ultimately performed in the United States—thus making them subject to the laws of this nation." 399 F.2d at 798-799.

Thus, the decision of the Court of Appeals is that all terms of Petitioners' contracts abroad, and all acts of performance thereunder consummated abroad, became unlawful by "the laws of this nation" because of the single act of "delivery of goods to American ports," supposed by the Court to be covered by the terms of the contracts.[6]

Summarizing to this point, this Court in 1958 sustained the challenge of the Isbrandtsen Line to the "dual-rate contract system" in *Federal Maritime Board v. Isbrandtsen Co., supra.* After three years of investigating the

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[6]The patent error of this supposition is set forth at pp. 10-13, *infra.*

matter, Congress enacted new legislation in 1961 reversing *Isbrandtsen* upon a finding by both Houses of Congress that "dual-rate contracts" and healthy foreign trade are inseparable.[7]

At the very outset of the administration of the new statute, the declared purpose of which was "to authorize . . . fair and effective dual-rate contracts," this case was initiated by compiaint of the Department of Justice to give extraterritorial force to the specific terms of the new section 14b. Instead of "authoriz[ing] . . . fair and effective dual-rate contracts," the complaint here forced the dissolution of the conference and permanent obliteration of the "dual-rate contract system" which the statute was enacted to preserve.

No claim is made in the complaint of any "effect" in the United States of Petitioners' "dual-rate contracts" executed abroad. There is no allegation of any performance of the contracts within the United States. There is no allegation of any harm to the United States public interest resulting from Petitioners' execution or performance of their contracts abroad. The complaint seeks only judicial determination of extraterritorial enforcement of the statute—plus, of course, the excessive penalties.

REASONS FOR GRANTING THE WRIT

Unless reviewed and reversed by this Court, the decision of the Court of Appeals will subject Petitioners to penalties of up to $1,000-a-day from April 4, 1962, to

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[7] "Steamship Conferences and Dual Rate Contracts," Sen. Rep. No. 860, *supra*, at 1-2, 10.

August 15, 1962, for their performance abroad of contractual obligations that were lawful and enforceable there under contracts that had no harmful effects within the United States.

The "delivery of goods to American ports" by foreign carriers, which was attributed to the contracts by the lower court, is not a subject of the U.S. Shipping Act. It is not prohibited by that Act nor otherwise reprehended in that Act or in any other American statute. The lower Court found nothing else under the contracts "consummated in the United States." Petitioners, who are vessel-owners of six friendly European nations, are therefore to be punished for their conduct abroad, not for the innocuous "delivery of goods to American ports".

The opinion of the Court of Appeals noted a "trend today" to uphold extraterritorial application of the U.S. Shipping Act. Such a trend is readily discernible in recent decisions of the Federal Courts.[8] None is found, however, that upholds a penal provision of the Shipping Act against foreigners acting lawfully abroad and harmlessly in the United States. No precedent is found that impairs the vigor of this Court's opinion in *Lauritzen v. Larsen,* 345 U.S. 571 (1953), that:

> "In dealing with international commerce we cannot be unmindful of the necessity for mutual forebearance if retaliations are to be avoided; nor should we forget that any contract which we hold sufficient to warrant application of our law to a foreign trans-

[8] *Kerr Steamship Co. v. U.S.,* 284 F.2d 61 (2d Cir. 1960), *cert. granted, petition for review dismissed as moot,* 369 U.S. 422 (1962); *Federal Maritime Commission v. DeSmedt,* 366 F.2d 464 (2nd Cir. 1966), *cert. denied,* 385 U.S. 974 (1966); *U. S. v. Anchor Line, Ltd.,* 232 F.Supp. 379 (S.D.N.Y. 1964).

> action will logically be as strong a warrant for a foreign country to apply its law to an American transaction." 345 U.S. at 582.

Precursing this Court's opinion in *Lauritzen v. Larsen,* the Second Circuit Court of Appeals said, in *United States v. Aluminum Co. of America,* 148 F.2d 416, 443 (2nd Cir. 1945):

> ". . . any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . ."

The Court, in *Alcoa,* rejected extraterritorial application of the anti-trust laws in the absence of any direct effect in the United States, saying:

> "We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States . . . On the other hand, it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize . . . Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them." 148 F.2d at 443.

In the *Anchor Line* case (*supra,* note 8), the Second Circuit gave extraterritorial application to Section 15

of the Shipping Act (46 U.S.C. 814) upon the uncontested finding that rate-fixing agreements executed in Europe determined uniform rates *charged in the United States, to American importers*. Thus, the Second Circuit simply followed *Alcoa*.

The philosophy expressed in the decisions of the Second Circuit in *Alcoa* and *Anchor Line* and the decision of the Fifth Circuit here are irreconcilable. The first requires a reprehensible effect in the United States in order to punish foreigners for conduct abroad; the other does not. This Court should hear and decide this important question of the permissible extraterritorial reach of a U.S. statute. It is crucial in the rapidly growing regulation of foreign transactions in the course of trade between the United States and other maritime nations. The lower Court's decision has outstripped the "trend of the law today" in other circuits. Other nations have expressed their vigorous and just resentment toward what appears to them unwarranted interference in their domestic affairs without compensating benefits to any legitimate interests of the United States.[9] An authoritative decision and resolution of an issue transcending purely local interests of the United States is the right and indeed the responsibility of this Court.

What has been said above assumes the correctness of the Court of Appeals' construction of Petitioners' "dual-rate contracts" abroad to include "delivery of goods to American ports." In fact, however, the lower Court's view of the contracts is flatly and demonstrably wrong. Bills-of-lading are the contracts between shipper and

[9]See Appendix E.

carrier that cover delivery of cargoes to consignees.[10] "Dual-rate contracts" cover only "shipment" or "tender" by the shipper to the *carrier*.[11] The construction placed upon Petitioners' "dual-rate contracts" by the Court of Appeals appeared in the case for the first time in that Court's opinion. The Government's complaint correctly interpreted the contracts to relate only to "tender" of cargoes by European shippers to Petitioners' vessels at European loading ports.[12] The Government did not argue otherwise throughout the proceedings below.

The Court of Appeals found "delivery of goods to American ports" to be a part of the contract only by a strained misreading of articles 1 and 2 of the English translation of the contract before the Court [JA pp. 81-87]. Article 1 contains the shipper's promise to "offer" his cargoes to petitioners' vessels "for transportation by them to the United States" [JA p. 82]. This is the shipper's promise, not the carrier's, and plainly covers only his promise to "*offer* his cargoes," an act consummated only at *loading* ports, all of which are shown in the contract to be "ports between Hamburg and Bayonne" in the Continental European range [article 2; JA p. 82].

The real basis of the lower Court's inclusion of "delivery" under the contracts appears to be that portion of article 2 reading:

> "*The carriers* [Petitioners] *agree*, subject to provisions hereof, *to transport said shipments on their vessels sailing to the aforesaid ports.*" [JA p. 82].

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[10] *Alcoa Steamship Co. v. United States*, 338 U.S. 421 (1949).

[11] See, in this case, Appendix F, articles 1 and 2 [JA p. 82].

[12] Complaint, par. 6 [JA p. 2].

The italics are those of the Court of Appeals (399 F.2d at 798, n. 6). Had the Court given equal emphasis to the words it did not underline, the result would have been different.

One of the provisions of the contract invoked in the "subject to" proviso of article 2 above is article 6, reading in pertinent part:

> "Shipments are subject to all the provisions of the permit, dock receipt and bill of lading in use by the carrier where shipment is tendered." [JA p. 86].

Thus, chronologically, the shipper abroad "offers his cargo" to a vessel of one of Petitioners at a port between "Hamburg and Bayonne", and thereby is accorded a lower rate for the carriage which will follow; at this point, performance of the "dual-rate contract", by both parties, is complete. The carrier then issues to the shipper a "permit", authorizing the shipper to send his cargo to the vessel's berth, indicating that space on the vessel is reserved. When received, the carrier's terminal issues the "dock receipt", acknowledging transfer of custody of the cargo from shipper to carrier. When loaded aboard, the carrier is required to issue a bill-of-lading. The bill-of-lading then becomes the "contract of affreightment" and supersedes all previous arrangements, agreements and understandings between shipper and carrier.

The bill-of-lading must be distinguished from the "dual-rate contract". See *Parsons & Whittemore, Inc. v. Rederiaktiebolaget Nordstjernan,* 141 F. Supp. 220, 223 (S.D.N.Y. 1956). The bill-of-lading covers the transportation from beginning to end—from port of loading in Europe to port of discharge in the United States. The bill of

lading, including "delivery of goods", is governed by the U.S. Carriage of Goods by Sea Act (46 USC 1300-1315).[13]

In contrast, the shipper's obligations under the "dual-rate contract" are fully discharged upon "tender" to Petitioners' vessels at port of loading abroad *before* the contract of carriage, from the port of loading to the port of discharge, is issued. Simiarly, Petitioners' obligations under the "dual-rate contract" are fully performed when they assess the shipper the lowest available freight rates — generally, even before the cargo is loaded. *Parsons & Whittemore, supra.*

In summary, therefore, the Court of Appeals wholly misconstrued both the purpose and the effect of the "dual-rate contracts" between Petitioners and shippers in Europe, to include "delivery of goods to American ports".

If, solely for sake of argument, "dual-rate contracts" abroad did include "delivery" in the United States, nevertheless, as already shown, delivery in the United States by foreign carriers is not a "reprehensible act" and cannot support the imposition of fines against Petitioners for their performance of entirely different terms of the contracts outside the United States.

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[13]The Carriage of Goods by Sea Act (COGSA) was passed in 1936. It is the American statutory regulation of ocean bills-of-lading adopted in an attempt to insure uniformity and standardization of such bills-of-lading throughout the commercial nations of the world. Poor, *Charter Parties and Ocean Bills of Lading,* 3d Ed., p. 128.

Section 13 of the COGSA provides: "This Act shall apply to all contracts for the carriage of goods by sea to or from ports of the United States in foreign trade".

While the essence of the Court of Appeals' decision is its supposed "delivery of goods to American ports" under Petitioners' "dual-rate contracts", the Court invoked two additional grounds. Both are equally erroneous assumptions. The Court reasoned that:

1. The eight statutory "safeguards" written into section 14b in P.L. 87-346 were intended to protect the welfare of foreign exporters and importers as well as American; and

2. American shipping lines have voluntarily submitted to the terms of section 14b in their contracts abroad and therefore foreign lines must be forced to submit to United States regulation in order to make that regulation of the "dual-rate contract system" "effective".

Upon the first point, the lower Court said:

> "We observe no determination by Congress to limit the application of these regulatory provisions to American exporters or importers as contended by appellants, or that Congress was concerned only with shippers and consignees contracting in the United States." 399 F.2d at 799.

The lower Court thus acted on a presumption of legislative intent to regulate extraterritorially, in the absence of evidence to the contrary "observed" by the Court. The Court erred as a matter of law. This Court has established the rule that courts are to presume that Congress did *not* intend to legislate extraterritorially in the absence of clear, unequivocal evidence of a contrary intent. Thus, in *Sandberg v. McDonald*, 248 U.S. 185 (1918), this Court said, at page 195:

> "Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. . . . Congress could not prevent the making of such contracts in other jurisdictions. If they saw fit to do so, foreign countries would continue to permit such contracts and advance payments no matter what our declared law or policy in regard to them might be as to vessels coming into our ports."

Additionally, the lower Court overlooked numerous, repeated declarations by the legislators who framed and enacted section 14b disclaiming any intent to regulate transactions abroad, and equally frequent statements of intent to safeguard only "American exporters and importers" in prescribing the terms of section 14b. For example, the Report of the Senate Commerce Committee accompanying the bill which became P. L. 87-346, declares:

> "Your committee has been constantly aware of the fact that further unilateral attempts by this Government to regulate the details of commercial transactions of shippers and carriers which take place and are documented abroad, are likely to have two major deleterious effects and negligible counterbalancing benefits. First, they are likely to create further resentment among our foreign friends and, as a consequence, to cause reactions ranging from passive loss of confidence to active retaliation in foreign ports. In the process, they might well force foreign lines out of conferences, thereby destroying conferences and placing the high-cost American operator, even if subsidized, at a serious if not impossible competitive disadvantage. Second, and perhaps equally serious, to the extent such extraterritorial regulation cannot be as effectively enforced against

> foreign flag lines as against their competitors, our American lines, we would be working at serious cross-purposes with fundamental precepts of national maritime policy." Sen. Rep. No. 860, *supra,* at 3.

The precise consequences of attempting to regulate "dual-rate contracts" abroad feared by the Senate Commerce Committee occurred in Petitioners' trade because of the threat of this lawsuit. The foreign lines withdrew from the Conference on August 15, 1962, under the threat of huge penalties in the United States if they continued to carry out their "dual-rate contracts" abroad and, on the other hand, clear liability in European courts if they did not.

Moreover, the Congressional intent to limit the "safeguards" in section 14b to the protection of "American exporters and importers" is plainly evidenced throughout the legislative history of section 14b. Thus the Senate Commerce Committee Report states at the outset:

> "In two respects that bill as it passed the House constitutes a landmark of sensible international shipping regulatory legislation. First, it accords great weight to the *rights and needs of American shippers.* Second, it forthrightly rejects the domestic antitrust argument that fair and effective exclusive patronage contracts between shippers and steamship conferences should not be legalized." Sen. Rep. No. 860, *supra,* at 1 (emphasis added).

Again the Committee Report stresses the legislative intent to protect "American importers and exporters" in the following passages:

> "This preponderance of shipper support for the legalization of steamship conference dual-rate contracts takes on added significance from the fact that

the House Merchant Marine and Fisheries Committee held hearings throughout the United States and took extensive testimony from almost 100 witnesses representing *American importers and exporters.*

"The thoroughness and fairness with which the House committee considered the needs of shippers in their relations with steamship conferences, expedited greatly this committee's undertaking. Most of the shippers' protections incorporated in the House bill appear in your committee's amendments, a few have been broadened; a few new ones added; a few which were there have been deleted, and they are explained hereinafter."[14] *Ibid.,* p. 2 (emphasis added).

"*Primary parties in interest strongly favor legalization of dual-rate contracts.*—The great majority of *American importers and exporters* who use ocean common carriers, all American-flag ocean common carriers, all foreign-flag conference lines, all interested foreign governments, and our own Departments of State and Commerce favor legalization of dual-rate contracts. This is in accord with the House report on this bill, and with our own independent determination from extensive hearings and consultations with representatives of the interested parties listed above.

* * *

"With all these protective restraints written into the statute, shippers' interests would, we feel, be protected to the maximum extent possible." *Ibid.,* p. 11 (emphasis added).

Clearly, the legislative record gives overwhelming proof of Congressional interest to safeguard "American ex-

[14]The Committee is here talking of the "dual-rate contract" terms, to be added by the new statute.

porters and importers", not foreign exporters and importers.[15] If it were the purpose of Congress to fashion contractual safeguards for the benefit of foreign exporters and importers, such legislation would exceed the legitimate "public interest" upon which statutory impairment of private contracts rests.[16]

It would, as well, fly in the face of basic principles of international law and comity, heretofore respected by this and the lower Federal Courts in landmark decisions directed against United States interference in domestic affairs of other nations "for their own good", such as:

McCulloch v. Marineros de Honduras, 372 U.S. 10 (1963);

Vanity Fair Mills v. T. Eaton Co. Ltd., 133 F.Supp. 522, 529 (S.D.N.Y. 1955), *aff'd,* 234 F.2d 633, *cert. denied,* 352 U.S. 871 (1956).

Finally, as noted above, the lower Court's decision rests upon a supposition that regulation of "the dual-rate contract system" by the United States would be "practically non-existent" if the contracts of foreign carriers with foreign shippers were excluded. This is simply to say that regulations of the United States cannot govern effectively

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[15]In some U.S. trades, *e.g.,* the import coffee trades, "dual rate contracts," are executed with the American importers, rather than the foreign exporters. Where however (as here) *only* the foreign exporters are the contract signatories, the American importer has no burdens under the contract, and hence no concern with the contractual terms. Section 14b offers the "American importer" no "safeguards" where (as here) he is not a contract signatory.

[16]*Munn v. Illinois,* 94 U.S. 113 (1876).

The "public" welfare that supports repudiation of private contractual property rights means the U.S. public, not the public of Belgium, France, Holland, Germany and other independent, friendly nations. See *U.S. v. Concentrated Phosphate Export Ass'n,* 273 F.Supp. 263, 273 (S.D.N.Y. 1967).

abroad unless its laws are given extraterritorial effect by United States courts. The same observation applies equally to the governments of every nation on earth with respect to every other when there are relations between them. It begs the question.

The question before the Court is not one of policy but of judicial construction of a federal statute under settled principles of international and constitutional law. Until the decision below, American courts had given recognition to the principle that not all American regulations can validly operate abroad in commerce with other nations, no matter how desirable such regulations might appear from this nation's point of view. This is upon the doctrine of international law laid down by this Court in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), and followed by the Second Circuit recently in *Empresa Hondurena De Vapores, S.A. v. McLeod,* 300 F.2d 222 (2d Cir. 1962), saying, at page 231:

> "Literally the words cover the case. Yet the Board would hardly insist that the words apply to everything within their literal reach; we have not heard it suggested that the Board considers its power to extend to the stevedores who load Empresa's ships in Honduras although they are engaged in 'commerce' quite as much as the seamen who man them. Neither do we suppose the Board would think it could direct an election among miners employed by a wholly owned subsidiary of an American company abroad, even though the ore was shipped to the United States and American employees of the parent were objecting to what they regarded as unfair wage competition arising from lack of effective organization among the foreign miners, although again the words literally

> apply. Words are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage."

It should be pointed out here that exclusion of Petitioners' contracts from the penalties prescribed for section 14b would not, in fact, render U.S. regulation of the "dual-rate contract system" "non-existent". If it were true, as the lower Court determined, that the contracts were "ultimately consummated in the United States" by the "delivery of goods to American ports", there would be no barrier against United States regulation of the *delivery of goods in the United States.*[17] That, however, is not the thrust of the complaint. The complaint charges that the execution of the contracts, and the terms operative only abroad, were prohibited by section 14b.

These Petitioners have not challenged, and do not challenge, the application of the U.S. Shipping Act to their "dual-rate contracts" with American exporters or American importers, wherever executed, as the lower Court suggests. They acknowledge that American law is alone operable on such transactions. No conflict with foreign law can result, bringing all such contracts within the doctrine of *Steele v. Bulova Watch Co.,* 344 U.S. 280 (1952). They

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[17]Cf. *U.S. v. Anchor Line, supra,* and *Compagnie Generale Transatlantique v. American Tobacco Co.,* 31 F.2d 663 (2nd Cir. 1929). In a decision which should be dispositive of the instant case, this Court distinguished the act of "shipment" or "tender" of goods to a carrier abroad from "delivery" in the United States, saying that the latter may be regulated by the United States but the former may not. *U.S. v. Freeman,* 239 U.S. 117, 129 (1915).

challenge only the application of the U.S. statute to their transactions abroad where local law is operable and conflicts were immediately created.

CONCLUSION

The question presented is a straight question of law. It involves simply the determination of the extraterritorial reach of a federal regulatory statute, section 14b of the U.S. Shipping Act, enacted under the Commerce Clause of the Constitution. Many, oft-cited, landmark decisions of this Court have established certain guidelines for the resolution of such questions in the judiciary. Among these is the universally respected principle of international law that conflicts between U.S. law and local law abroad should be avoided with respect to transactions and conduct outside the United States.

In furtherance of the above doctrine of international law, this Court has established a judicial presumption that a U.S. statute is not intended to apply abroad in the absence of a clearly expressed contrary purpose by the Congress. The Court of Appeals acted upon a novel, unprecedented presumption that Congress intended to legislate extraterritorially in the absence of a contrary intent observed by the Court.

The principle of statutory construction thus engineered by the lower Court cannot stand along side the forbearance principles of international law established in this Court for over a century and more, in dealing with international trade and commerce.

A second, controlling guideline in construing statutes relating to commerce "with foreign nations" is that a U.S. statute will not be applied to a foreign transaction that has no consequences in the United States, or has only consequences in the United States that the United States does not "reprehend".

The Court of Appeals applied the prohibiting terms of section 14b of the U.S. Shipping Act to Petitioners' "dual-rate contracts" abroad despite the clear absence of any effect in the United States that was harmful to American interests.

Heretofore, the administration of the Sherman Act has set the outer limits of U.S. regulation abroad under the Commerce Clause. It was noted in the *Empresa Hondurena* case, *supra,* that,

> "The occasional application of the anti-trust laws to activities abroad has not been without its problems." 300 F.2d at 234.

The trend toward upholding the extraterritorial reach of the Shipping Act, which prompted the Court of Appeals' decision, has created insurmountable conflicts with the laws of other nations, with negligible if any benefits to U.S. interests, in commerce with other nations. Diplomatic protests from abroad have been bitter and continuous.

Had the Court of Appeals analyzed, in its opinion, the particular terms of section 14b of the Shipping Act invoked in the complaint, it must have been plain that writing them into Petitioners' "dual-rate contracts" abroad could not have changed the effects of the con-

tracts, in the United States, in any way beneficial to American interests. There is no such allegation. The punishment of Petitioners, therefore, for their inability to obey the requirements of section 14b in their homelands, will not and cannot carry out the purpose of Congress in the enactment of that section, so clearly stated to be "protection of American exporters and importers".

Accordingly, this Court is urged to review and reverse the decision of the Court of Appeals. The petition for a writ of certiorari should be granted.

Respectfully submitted,
GRAHAM & JAMES,
LEONARD G. JAMES,
F. CONGER FAWCETT,
Attorneys for Petitioners.

Dated at San Francisco, California,
December 19, 1968.

(Appendices Follow)

Appendix "A"

In the

United States Court of Appeals
for the Fifth Circuit

No. 24427

ARMEMENT DEPPE, S.A., ET AL.,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(August 8, 1968)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

AINSWORTH, Circuit Judge: Appellants are nine foreign common carrier steamship lines, which were members of the Continental-U.S.A. Gulf Westbound Freight Conference, engaged in the operation of ocean vessels from the Continent of Europe to United States Gulf ports. They moved to dismiss for lack of jurisdiction over the subject matter of the complaint, this civil action brought by the United States under Sections 14b and

15 of the Shipping Act of 1916 as amended (46 U.S.C. §§ 813(a), 814), to recover penalties for violations of the Act.[1]

This is an interlocutory appeal under 28 U.S.C. § 1292(b) from the denial by the District Court of the motion to dismiss.[2]

In 1958, the Supreme Court held in *Federal Maritime Board v. Isbrandtsen Company,* 356 U. S. 481, 78 S. Ct. 851 (1958), that the dual-rate (exclusive patronage) contract system of ocean common carriers and conferences violated the Shipping Act of 1916 and was a "resort to other discriminating or unfair methods" prohibited by the Act. 356 U. S. at 493. The decision was far reaching and disturbing in its effect in the maritime industry, and Congress in 1961 enacted legislation amending the Shipping Act of 1916 by adding a new section, 14b,[3] by the

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[1]The complaint as originally brought also included three American-flag lines, also members of the Conference, but these claims have been compromised and dismissed with prejudice.

[2]We granted leave to appeal under 28 U.S.C. § 1292(b) by our order of January 24, 1967.

[3]Section 14b (46 U.S.C. § 813a) is as follows:

"Notwithstanding any other provisions of this chapter, on application the Federal Maritime Commission (hereinafter 'Commission'), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification

terms of which the use of dual-rate contracts was permitted under certain conditions. A dual-rate contract system is one under which shippers, by agreement, tender all or any fixed portion of their cargo destined for certain designated American ports to conference carriers, as a result of which they pay a lower rate for the shipping of commodities than other shippers.

Under the new Section 14b of the Shipping Act of 1916 as amended, conference carriers in American foreign com-

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thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates;

merce were required to amend their shipper contracts by including the eight substantive provisions set out in Section 14b, and to obtain approval thereof by the Federal Maritime Commission. Otherwise, such dual-rate contracts would be unlawful and expose the violator to a penalty of $1,000 per day for each violation of Section 14b, to be recovered by the United States in a civil action as provided in Section 15 of the said Act as amended (46 U.S.C. § 814). Under terms of the new amendments

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(8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however,* That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term 'contract shipper' means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section."

to the Shipping Act, a grace period of one year for contracts amended in accordance with the new provisions was granted, provided they were filed with the Commission within six months after the enactment of the statute which occurred on October 3, 1961. Appellants failed to amend and obtain approval from the Federal Maritime Commission of their dual-rate contracts in accordance with the new amendments to the law, by the required date of April 3, 1962. On August 15, 1962, they dissolved their Conference and terminated the dual-rate contracts. Thus the United States is seeking to recover penalties in this civil action for the period April 3, 1962, to August 15, 1962, at the rate of $1,000 for each day of a violation by each carrier.

We are called upon to decide whether Congress may enact a statute which gives the United States jurisdiction over foreign shipowners and their shipping contracts, in the transportation of commodities to American ports in foreign commerce, which may subject such foreign shipowners to penalties for violation of the statutory provisions due to noncompliance; and if such jurisdiction is permissible, whether Sections 14b and 15 of the Shipping Act of 1916 as amended, were intended by Congress to be applicable to such contracts and foreign-flag shipping lines transporting commodities to American ports in foreign commerce.

I.

It is well settled that when a foreign-flag shipping line chooses to engage in foreign commerce and use American ports it is amenable to the jurisdiction of the United States and subject to the laws thereof. *The Schooner Ex-*

change v. M'Faddon and Others, 7 Cranch 116 (1813). This time-honored principle was reiterated in the "Wildenhus's Case," *Mali v. Keeper of the Common Jail,* 120 U. S. 1, 11, 7 S. Ct. 385, 387 (1887), in the following language: "It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding or agreement. . . ." Later the Supreme Court said in *Benz v. Compania Naviera Hidalgo, S. A.,* 353 U. S. 138, 142, 77 S. Ct. 699, 701, 702 (1957), "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. . . . In *Lauritzen v. Larsen,* 345 U.S. 571, 592, 73 S. Ct. 921, 933 (1953), it was held that Congress may "condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to exact."

Appellants find no fault with the foregoing principles and in their reply brief admit that the United States has the "power" to exclude foreign vessels from United States ports and, correspondingly, to condition their entry into United States ports; that the conduct of foreign vessels is subject to United States law while they are "within U. S. ports"; and that contracts of foreign shipowners, wherever executed, may be governed by United States law when they are performed or effectuated "within the U. S."

But appellants contend that these principles are not at issue here. They state that the Government has ad-

mitted "that nothing more than the 'tender' of the shippers' cargo was involved in the contracts,"[4] and contend that "Nothing could have been done under the contracts, by any party, outside the territorial waters of a Continental port in Europe." They attempt thereby to impress us that so far as the dual-rate contracts are concerned, they were completed in a foreign country when tender of shipments was made by foreign shippers to foreign carriers.[5] Appellants contend, therefore, that all of the dual-rate contracts here involved are by foreign shipowners with foreign shippers and that the Shipping Act of 1916 as amended, cannot have extraterritorial effect in relation to these foreign nationals. But they thus ignore the provisions of their own dual-rate contracts and the plain language of Section 14b. The sample contract in the record discloses that the merchant who contracts with the carriers agrees to transport all of his commodi-

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[4]It is doubtful that the Government's brief at the place referred to constitutes an admission. The brief states: "At all pertinent times the conference employed a 'dual-rate contract system' under which shippers who agreed to tender all of their cargo destined for the designated American ports to conference carriers paid a lower rate than other shippers (R. 2, 81)."

[5]The affidavit of Mr. Loots attached to appellants' motion for reconsideration of the denial of the motion to dismiss avers that affiant served as Secretary of the Continental Gulf Westbound Freight Conference and executed contracts with shippers in behalf of the Conference members; that such contracts were executed at the office of the Conference in Antwerp, Belgium, and the great majority were exporting companies organized in Austria, Belgium, Denmark, England, France, Germany, Holland, Hungary, Luxembourg and Switzerland. Mr. Loots further averred that the Conference records contained a number of contracts executed with American companies but stated his conclusion that "Since our contracts covered only the shipment of European products, from European ports, all contract shippers were European shippers in their relations with the Conference members, regardless of the country in which they were organized and of their principal place of business".

ties to United States Gulf ports from Europe, using Conference carriers, and that the failure to do so is a violation of the contract. By the terms of the contract (para. 1) "the Merchant agrees to offer, or cause to be offered to the Carriers *for transportation by them to the United States* through any port . . . in the Gulf of Mexico . . . all shipments of the commodities mentioned. . . ."[6] (Emphasis added.)

As the United States points out, its complaint in this case charges appellants with "*employing* a dual-rate system not amended to comply with Section 14b of the Shipping Act of 1916 . . . ." (para. 10). The Government urges that the amended statute refers to "*the use* by any common carrier or conference of such carriers in foreign commerce of any contract" not conforming to

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[6]The full text of pertinent provisions of the sample contract is as follows:

"1. In consideration of the rates and other conditions stated herein, the Merchant agrees to offer, or cause to be offered to the Carriers *for transportation by them to the United States* through any port or waterway in the Gulf of Mexico in the range from Tampa, Florida to Brownsville, Texas, both included and discharge [sic] at such ports of said range served by the Carriers as may be designated by the Merchant, all shipments of the commodities mentioned (or provided) below.

"2. *This contract covers all export shipments of the merchant* of the herein named (or provided for) commodities *moving out of Continental European Ports,* between Hamburg and Bayonne, both inclusive, *to or through ports of aforesaid United States Gulf of Mexico range* and all said shipments shall be tendered to the Carriers for their vessels which may load at Continental European ports between Hamburg and Bayonne, both inclusive, and scheduled to sail to the port of destination designated by the merchant, and failure so to tender such shipments to the Carriers or shipment of them by vessels other than those of the Carriers, shall be a violation of this contract. *The Carriers agree,* subject to provisions hereof, *to transport said shipments on their vessels sailing to the aforesaid ports.*" (Emphasis added.)

the Act and the applicable section states that "it shall be unlawful *to carry out*" any such contract (Section 14b). (Emphasis added.)

We have no difficulty, therefore, holding that under the power which Congress has to regulate commerce with foreign nations under Art. I, § 8 of the Constitution, it has authority to enact laws regulating the shipping contracts of foreign-owned shipping lines regardless of the fact that the contracts are executed in foreign countries with foreign nationals, inasmuch as the contracts are to be used, employed, and carried out in American foreign commerce in the delivery of goods to American ports. Consummation of the contracts is, therefore, by acts which are ultimately performed in the United States—thus making them subject to the laws of this nation. The only logical conclusion fairly to be reached is that foreign-owned ships which use our American ports must comply with the laws of the United States in connection with shipping contracts and specifically with the employing of the dual-rate contract system.[7]

II.

The historical background for the enactment of Sections 14b and 15 of the Shipping Act of 1916 as amended, by Congress in 1961, gives clear evidence of the inten-

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[7] "It seems clear that no principle of international law forbids full implementation of the Shipping Act as amended in 1961. Contrary to the protests of foreign shipowners that the United States lacks 'jurisdiction' to regulate extraterritorially, the trend of the law today upholds such regulation." Jack, *Self-Policing of Ocean Shipping Conferences*, 20 Stanford L. Rev. 724, 729 (1968). See also, Note, *Rate Regulation in Ocean Shipping*, 78 Harv. L. Rev. 635, 641, 642 (1965).

tion to apply the provisions of the Act to foreign-owned shipping lines. The amendments to the Shipping Act directly flowed from the Supreme Court's decision in *Federal Maritime Board v. Isbrandtsen Company,* supra, the purpose being to legislatively overrule that decision under certain limitations and restrictions provided for in the new enactment. The legislative history indicates that foreign-flag vessel owners sent their representatives to the congressional hearings on the bills and objected to having these penalty provisions apply to foreign-flag shipowners. However, no exception was made in the Act for foreign-flag shipowners, and the terms of the applicable sections regulate all common carriers or conferences, foreign or American, using a dual-rate contract system, which are engaged in American foreign commerce and use American ports.[8]

We observe no determination by Congress to limit the application of these regulatory provisions to American

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[8]Both appellants and appellee quote extensively from the legislative history as it developed in House and Senate proceedings when the amendment to the Shipping Act of 1916 (H. R. 6775) were being considered. We are satisfied from reviewing the cited portions of the Congressional Record that Congress intended to make the new provisions relating to dual-rate contracts apply to all shipowners, foreign and American, and that the Act was passed over the strong opposition of foreign shipowners appearing through their chosen representatives and counsel. The citations to legislative history are too numerous to mention here; several references are pertinent: Ocean Common Carriers—Dual Rate Contracts, 87th Cong., 1st Sess., 1961 U. S. Code Cong. & Adm. News 3108; Providing for the Operation of Steamship Conferences, House Report No. 498, June 8, 1961, to accompany H. R. 6775; 107 Cong. Rec. 19305 (1961) (Senator Engle); 107 Cong. Rec. 21143 (1961) (Senator Engle); 107 Cong. Rec. 19310 (1961); 3 Hearings Before the House Committee on Merchant Marine & Fisheries, 87th Cong., 1st Sess., 233 (1961); 4 Hearings Before the Merchant Marine & Fisheries Subcom. of the Senate Com. on Commerce, 87th Cong., 1st Sess., pt. 1 at 126.

exporters or importers, as contended by appellants, or that Congress was concerned only with shippers and consignees contracting in the United States. The dual-rate contract system would be largely unworkable and impractical if so restricted. Foreign-flag shipowners dominate most conferences and it is said that American carriers "account for only a small vote in virtually every important conference serving our foreign trade."[9]

In the Continental-U.S.A. Gulf Westbound Freight Conference, with which we are concerned here, only three of the twelve carrier members were American carriers. It would be an odd result if three of the members observed Section 14b requirements, while the nine other foreign-flag members were completely unrestricted in their employment of dual-rate contracts in the transportation of commodities in foreign commerce to *American* ports. Regulation of the dual-rate contract system as it applies to *American* foreign commerce would be practically nonexistent, therefore, if a majority of the carriers—the foreign shipowners—were thus without the scope of the law.

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[9]Ocean Common Carriers—Dual Rate Contracts, 87th Cong., 1st Sess., 1961 U. S. Code Cong. & Adm. News 3108, at 3139. Of 62 conferences with dual-rate contracts, in only 5 were American-flag lines in the majority. Foreign lines usually predominated. E. g., in Associated Steamship Lines (Manila) there were 50 foreign-flag lines and 8 American; Association of West Coast Steamship Companies, 14 foreign and 2 American; Brazil-United States-Canada Freight Conference, 13 foreign and 2 American; Camexco Freight Conference, 13 foreign and 1 American; North Atlantic Baltic Freight Conference, 18 foreign and 2 American; North Atlantic United Kingdom Conference, 11 foreign and 1 American. (Senator Kefauver's remarks in the Senate while the amendments to the Shipping Act of 1916 (H. R. 6775) were being considered) 107 Cong. Rec. 19343, 19344 (1961).

In *Compagnie Generale Transatlantique v. American Tobacco Co.*, 2 Cir., 1929, 31 F. 2d 663, cert. den., 280 U. S. 555, 50 S. Ct. 16 (1929), the Second Circuit held that conference shipowners were subject to the provisions of the Shipping Act of 1916 in connection with goods being transported between France and the United States even though the bill of lading was issued in France, the court indicating that Congress clearly meant to regulate all foreign commerce. See also *Kerr Steamship Company v. United States*, 2 Cir., 1960, 284 F. 2d 61, cert. granted, petition for review dismissed as moot, 369 U. S. 422, 82 S. Ct. 874 (1962); *Montship Lines, Limited v. Federal Maritime Board*, D. C. Cir., 1961, 295 F. 2d 147. We believe that Congress intended the provisions of the Act, including Sections 14b and 15, to apply to all common carriers or conferences of such carriers, foreign or American, in foreign commerce with the United States; that these statutory provisions apply as well to foreign carriers and their dual-rate contracts executed in foreign countries with foreign nationals.

Affirmed.

Appendix "B"

United States District Court
Eastern District of Louisiana
New Orleans Division

No. 13927 Civil Action

United States of America
vs.
Armement Deppe, S.A., et al

OPINION

Christenberry, J.

This suit is brought by the United States against numerous American and foreign shipping companies for penalties allegedly due as a result of defendants' violation of Sections 14(b) and 15 of the Shipping Act, 1916, as amended. (46 U.S.C.A. 813(a), 814).

The complaint alleges that during the period April 3, 1962, to August 15, 1962, all of the named defendants, then engaged in the business of common carriage by water, were members of the Continental-U.S.A. Gulf Westbound Freight Conference; that the Conference employed a dual-rate contract system by which shippers who agreed to tender all of their cargo destined for the U.S. Gulf of Mexico ports to Conference carriers would pay a lower transportation rate than would non-contracting

shippers; and that during the above-mentioned period the defendants operated illegally under contracts which were not approved by the Federal Maritime Commission nor amended to comply with Section 14(b) of the Act. On the basis of these allegations the Government seeks penalties as set out in the Shipping Act.

Included among the several defendants are various foreign shipowners who operate foreign-flag vessels between ports on the Continent of Europe and the Gulf ports of the United States. These defendants have moved to dismiss the complaint against them on the ground that Congress had neither the power nor the intention to regulate the terms and conditions of commercial contracts executed by them in Europe with European shippers for the transportation of goods from European ports on defendants' vessels.

For the purpose of this motion, the moving defendants admit that at the times alleged in the complaint they were parties to dual-rate contracts with exporters in Belgium, France, Germany, Holland and other European countries and that such contracts were in force at the times alleged. However, nowhere is there any indication that movers contracted *only* with foreign shippers or that *all* of such contracts were executed outside the territorial limits of the United States.

Concerning this motion all well-pleaded allegations of the complaint must be taken as true, and the burden rests on movers to show the Court in appropriate form the pertinent factual basis on which they claim exemption from the reach of the laws they are charged with having violated. As the record now stands there has been an in-

sufficient showing to warrant consideration of the legal principles invoked by movers.

The motion of Armement Deppe, S.A., et al, foreign shipowners, for dismissal of the complaint against them, is, accordingly, Denied.

New Orleans, Louisiana, June 29, 1964.

Herbert W. Christenberry
United States District Judge

Appendix "C"

United States District Court
Eastern District of Louisiana
New Orleans Division

No. 13927 Civil Action

United States of America
vs.
Armement Deppe, S.A., et al

OPINION

Christenberry, J.

This is an action brought by the United States against nine foreign-flag shipping companies and three American shipping companies for allegedly violating Sections 14(b) and 15 of the Shipping Act, 1916, as amended. (46 U.S. C.A., §813(a), 814).

The complaint alleges that during the period April 3, 1962, to August 15, 1962, all of the named defendants, then engaged in the business of common carriage by water, were members of the Continental-U.S.A. Gulf Westbound Freight Conference; that the Conference employed a dual-rate contract system by which shippers who agree to tender all of their cargo destined for the U.S. Gulf of Mexico ports to Conference carriers would pay a lower transportation rate than would non-contracting shippers; and that during the above mentioned period the defendants operated illegally under contracts which were

not approved by the Federal Maritime Commission nor amended to comply with Section 14(b) of the Act. On the basis of these allegations the Government seeks penalties as set out in the Shipping Act.

As has been stated, included among the several defendants are various foreign shipowners who operate foreign-flag vessels between ports on the Continent of Europe and the Gulf ports of the United States. On February 17, 1964, these defendants submitted a motion to dismiss for lack of jurisdiction over the subject matter of the complaint — founded on the following grounds:

(1) "Under international law these contracts were beyond the jurisdiction of the United States", and,

(2) "Congress did not intend to reach them in any case." Oral argument on the motion was heard on April 15, 1964. On June 29, 1964, this Court denied the motion to dismiss stating:

> ". . . nowhere is there any indication that movers contracted only with foreign shippers or that all of such contracts were executed outside the territorial limits of the United States."

Now before the Court is a motion by the defendants for reconsideration of the motion to dismiss.

In support of the instant motion defendant's counsel has filed in the record an affidavit of Mr. Alphonse Loots, the Secretary of the Conference, in an attempt to correct the insufficiency which this Court had pointed out in denying the original motion to dismiss. Mr. Loots states in his affidavit,

> "The great majority were exporting companies organized in Austria, Belgium, Denmark, England,

> France, Germany, Holland, Hungary, Luxembourg and Switzerland. The conference records contain a number of contracts executed with American companies."

This Court believes that the mere fact that American shippers contracted in European ports, and the contracts covered only shipment of European products, would not change the American shippers into European shippers in their relations with the Conference, as suggested by Mr. Loots. To afford the defendants this construction would in effect make American shippers chameleons changing their status as they entered the various shipping conferences. From Mr. Loots' own affidavit it is clear that this Conference was not comprised solely of foreign shippers.

In *United States v. Anchor Line, Ltd.*, 232 F. Supp. 379 (1964), Judge Edelstein stated:

> "The vital principle to be applied in determining whether the United States courts have jurisdiction over foreign-flag carriers who fail to file contracts entered into abroad is whether the performance of those contracts or effectuation of those arrangements operated in this country so as to affect our foreign commerce directly and materially. See: *United States v. Aluminum Co. of America,* 148 F. 2d 416, 443, 444 (2d Cir., 1945)."

The motion for reconsideration of the motion to dismiss is, accordingly, Denied.

New Orleans, Louisiana, September 3, 1965.

Herbert W. Christenberry
United States District Judge

Appendix "D"

Supreme Court of the United States

No. ....., October Term, 1968

Armement Deppe, S.A., et al.,
Petitioners,

vs.

United States

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Dec. 23, 1968.

/s/ Hugo L. Black
Associate Justice of the Supreme
Court of the United States

Dated this 25th day of October, 1968.

Appendix "E"

No. 1621

The Embassy of Belgium presents its compliments to the Department of State and has the honor to refer to certain pending court action under Public Law 87-346.

The U.S. Department of Justice has instituted suit, under Civil Action File No. 13927, against members of the Continental U.S.A. Gulf Westbound Freight Conference, seeking to impose heavy fines for alleged infringement of the so-called BONNER ACT — Public Law 87-346.

The case is now pending in the United States District Court in New Orleans for the Eastern District of Louisiana, and has been referred to the Hon. Herbert W. Christianberry [sic], a judge of that Court.

The Continental U.S.A. Gulf Westbound Freight Conference, now dissolved, had its head office in Antwerp, Belgium, and the Belgian shipping lines "Armement Deppe" and "Compagnie Maritime Belge" were full members of the Conference.

All the signed contracts between the Conference members and the shippers, which are the subject of the pending suit, are physically located within the territorial jurisdiction of Belgium, where they are lawful and inforceable.

The Belgian shipping lines concerned could not comply with the United States interpretation of Section 14(b)

of P.L. 87-346 without subjecting themselves to civil penalties for violation of their own prior and valid contractual commitments in Belgium, or without having to waive, for the future, the liberty which is granted them under Belgium legislation to enter into such contracts.

The Belgian Government believes that any decision of the United States authorities to hold that such contracts between shipowners and shippers are unlawful, and to impose punishment thereby on the parties to the contracts, should be considered to be an intrusion by the United States into a province of the exclusive jurisdiction of Belgium where the contracts were signed.

Such action would also infringe upon established principles of international law, and would be inconsistant with the Treaty of Friendship, Commerce and Navigation concluded between Belgium and the United States.

The Belgian Embassy would very much appreciate the assistance of the Department of State in bringing these views to the attention of the Department of Justice and other appropriate authorities.

Washington, D. C.
April 15, 1964

The Department of State,
Washington, D. C.

April 17, 1964

On April 1, 1964 the German Minister of Transport sent the following letter to the German Shipping Companies Hamburg American Line, North German Lloyd and to the Combined Service of Ozean/Stinnes:

"You have informed me of the facts which constitute the basis for the complaint against you of the Department of Justice (Civil Action No. 1 3 9 2 7). Your view is that the aforementioned complaint

(1) violates a generally recognized fundamental principle of international law (the territorial principle) which according to Article 25 of the Constitution of the Federal Republic of Germany is an important part of German Federal Law;

(2) that Articles II and XVIII of the Treaty of Friendship, Commerce and Navigation of October 29, 1954 between the Federal Republic of Germany and the United States of America have been violated. The articles guarantee the freedom of shipping and trade between the areas of the parties to the treaty and in case of differences they provide for consultations between the two governments.

Thus I have found myself obliged to review the contracts of the Continental-U.S.A. Gulf Westbound Freight Conference, insofar as these contracts have been concluded with shippers resident in the Federal Republic of Germany.

The result of the review is as follows: the contracts of the Continental-U.S.A. Gulf Westbound Freight Conference are, insofar as they have been concluded with

shippers resident in the Federal Republic of Germany, legally valid according to German law. Thus the contract shippers resident in the Federal Republic of Germany could, according to German law, demand the carrying out of their contracts of the members of the Continental-U.S.A. Gulf Westbound Freight Conference which has since been dissolved, until these contracts have expired by way of accepted cancellation procedure in accordance with Clause 8.

The steamship companies members of the Conference cannot raise against such claims the objection that the provisions of Public Law 87/346 impede a fulfilment of the contracts. This derives from the territorial principle, a recognized basic principle of international law, which, according to Article 25 of the Constitution of the Federal Republic of Germany, is a valid German federal law."

It would be appreciated if the above letter could be brought to the attention of the Hon. Judge Herbert W. Christianberry [sic] of the United States District Court in New Orleans for the Eastern District of Louisiana.

Royal Swedish Embassy
Washington 8, D. C.
No. 72

The Ambassador of Sweden presents his compliments to the Honorable the Secretary of State and has the honor to submit the enclosed statement, concerning some aspects of the Swedish national legislation, with the request that it be forwarded to the United States District Court of the Eastern District of Louisiana, New Orleans Division, Division A, in connection with a civil action (No. 13.927) against the Swedish shipping company the "Swedish American Line".

Washington, D. C., April 16, 1964.

Royal Swedish Embassy
Washington 8, D. C.

The attention of the Swedish Government has been called to a civil action (No. 13.927) against the Swedish American Line at the U.S. District Court of the Eastern District of Louisiana, New Orleans Division, Division A, and the Swedish Embassy has been instructed to state the following:

1. The attached contract form* made up by the Continental-U.S.A. Gulf Westbound Freight Conference is not *per se* contrary to Swedish law.

2. If such a contract had been concluded between a shipper and a Swedish shipowner the former could bring a civil action before a Swedish court insofar the shipowner did not fulfil his obligations under the terms of the contract.

3. Neither the Swedish Government nor any Swedish authority has taken any action against parties to such a contract to have it invalidated.

---

*[Note: Contract form omitted in this Appendix; the English translation is reproduced in Appendix F hereto and in the separate Joint Appendix, pp. 81-87; 126-127]

No. 6083.

The Netherlands Chargé d'Affaires a.i. presents his compliments to the Honourable the Secretary of State and has the honour to draw the attention of Mr. Rusk to the following.

A civil action, No. 13927 Division "A", of the United States of America versus the N.V. Nederlandsche-Amerikaansche Stoomvaart Maatschappij "Holland America Line" in the U.S. District Court for the Eastern District of Louisiana, New Orleans Division, has been brought to the notice of the Netherlands Government.

The Netherlands Government is of the opinion that the contracts which are the subject of the suit in the abovementioned civil action, and which have been concluded by the Holland America Line and Shippers, are lawful and enforceable under the Law of the Netherlands.

Washington D. C., April 20, 1964.

To the Department of State
Washington D. C.

Appendix F

[English Translation]

Contract No. _____

Continental-U.S.A. Gulf Westbound Freight Conference

Secretary: A. Loots.
68, Paardenmarkt, Antwerp.

Memorandum of Agreement made this _____ day of _____ _____ 19 _____ between _____ hereinafter called the Merchant ("Merchant" includes subsidiaries, affiliates and agents of any of them), and the several Steamship Lines named below, members of the Continental-U.S.A. Gulf Westbound Freight Conference, herein called the Carriers. It is understood and agreed that if any additional Line or Lines become members of the Continental-U.S.A. Gulf Westbound Freight Conference, such Line or Lines shall thereby and thereupon become parties to this agreement as Carriers and the Merchant shall have the right to ship on such Line or Lines to the same extent as on the other Carriers, and should any Line or Lines cease to be members of the said Conference, they shall simultaneously cease to be Carriers hereunder, and this Agreement shall thereupon terminate and expire as between the Merchant and such Line or Lines but shall remain in full force and effect according to its terms as between the Merchant and the Lines still remaining members of said Conference.

1. In consideration of the rates and other conditions stated herein, the Merchant agrees to offer, or cause to be offered to the Carriers for transportation by them to the United States through any port or waterway in the

Gulf of Mexico in the range from Tampa, Florida to Brownsville, Texas, both included and discharge at such ports of said range served by the Carriers as may be designated by the Merchant, all shipments of the commodities mentioned (or provided) below.

2. This contract covers all export shipments of the merchant of the herein named (or provided for) commodities moving out of Continental European ports between Hamburg and Bayonne, both inclusive, to or through ports of aforesaid United States Gulf of Mexico range and all said shipments shall be tendered to the Carriers for their vessels which may load at Continental European ports between Hamburg and Bayonne, both inclusive, and scheduled to sail to the port of destination designated by the merchant, and failure so to tender such shipments to the Carriers or shipment of them by vessels other than those of the Carriers, shall be a violation of this contract. The Carriers agree, subject to provisions hereof, to transport said shipments on their vessels sailing to the aforesaid ports.

3. The Merchant has the option of selecting any of the vessels operated by the respective carriers to the destinations herein mentioned subject to agreement with the particular Carrier as to the quantity. The Merchant agrees to make application for space as early as practicable before the vessel's advertised sailing date. If the Carriers fail to name space within three full business days after the Merchant duly applies therefor, on a vessel scheduled to sail from the port of shipment selected within fifteen days after the loading date desired, the Merchant shall be free with respect to such shipment to secure space elsewhere without prejudice to his right

to future shipment under this agreement, but before making such arrangement the Merchant shall first give the office of the Conference two full business days to arrange space.

4. If, at any time, the Merchant shall make any shipment or shipments in violation of any provision of this Agreement, the Merchant shall pay liquidated damage to the Conference in lieu of actual damages which would be difficult or impracticable to determine. Such liquidated damages shall be paid in the amount of freight which the Merchant would have paid had such shipment or shipments moved via a Conference Carrier computed at the contract rate or rates currently in effect. Failure of the Merchant to pay liquidated damages within thirty days after the receipt of notice from the Conference that such liquidated damages are due and payable shall be cause for the Conference to terminate the Merchant's right to the contract rates until the Merchant pays to the Conference the amount due. In the event the Merchant violates the contract more than once in any period of twelve months, the Conference may cancel this contract by serving written notice of such cancellation upon the Merchant and notifying the United States Maritime Commission of such action. If the contract is cancelled for violation thereof as provided herein, the Conference may refuse to enter into a new contract with the Merchant until any unpaid liquidated damages due to the Conference have been paid in full.

In order that the Conference may determine the existence or non-existence of a violation hereof, the Merchant shall, upon request, furnish to the Conference full and complete information with respect to any shipment or

shipments made by such merchant in the trade covered by this agreement.

5. The commodities and rates thereon to which this agreement applies are:

[As Per Reverse Side or Attached]

Other commodities which are shipped by the Merchant from time to time, shall be deemed covered by this agreement, at the lowest Conference rates then in effect for the particular commodity.

The minimum charge on any one bill of lading or per package shall conform to the Carriers' charges in connection with the particular commodity in effect at time of shipment.

Unless otherwise specifically stated herein, packages or pieces exceeding 2000 kilos or 30 feet in length will take the additional Heavy Lift Charges and Extra Length Charges in effect at time shipments are made.

Rates quoted herein are in United States currency. Prepaid freight must be paid in United States dollars or in the currency of the port of shipment and will be calculated at the highest official rate of exchange for the U.S.A. dollars prevailing on the day prior to vessel's departure.

The rates herein specified are subject to being reasonably adjusted and any notice of such adjustment shall be deemed accepted by the Merchant, unless within twenty days after such notice, he gives the Carriers written notice of non-acceptance. In event of such non-acceptance, the Carrier shall have the option at any time within 20 days after receipt of the Merchant's notice to cancel

this agreement on giving the Merchant at least 60 days written notice, but if such notice is not given this agreement shall return in effect.

The Carriers have the option to reduce their rates, and should they during the terms of this agreement reduce their rates on the commodities herein named (or provided for) below the rates herein agreed, the Merchant, under like conditions, shall be given the full benefit of such reduced rates during the period same remain in effect.

6. Shipments are subject to all the provisions of the permit, dock receipt and bill of lading in use by the Carrier when shipment is tendered. If valuation higher than that provided by the regular form of bill of lading is desired by the Merchant it must be declared before shipment and, in accordance with tariff provisions, a higher rate paid than stated in this agreement.

7. In the event of any disputes pertaining to, and arising during the existence of this contract, such disputes shall be referred to a board of three arbitrators at the port of shipment, one of whom shall be appointed by each party to the contract and the two so nominated shall choose the third to act as umpire. The decision of any two of these shall be final and binding upon both parties in this contract.

8. This agreement shall cover shipments as above specified on vessels scheduled to sail from port at which shipment is loaded during the period from..... to..... both dates inclusive. The contract shall continue in effect on the same terms and conditions throughout consecutive subsequent years, subject to the right of either the Merchant or the Carriers to terminate

the same as of December 31 in any year by giving the other party ninety days written notice of termination.

9. In the event of the imminence or existence of war, hostilities or warlike operation between any nations, blockades, embargoes, regulations of any government authority, or any official interference with commercial intercourse, exchange or currency regulations, affecting the operations of the Carriers, or any of them in the trade covered by this agreement, the Carriers or any one or more of them shall at their option have the right to cancel this agreement.

For and on behalf of the Carriers:

Continental-U.S.A. Gulf Westbound Freight Conference

....

Secretary. Merchant.

Address: .....

Members of the Continental-U.S.A.
Gulf Westbound Freight Conference

Armement Deppe, S.A.
Bloomfield Steamship Company.
Compagnie Generale Transatlantique
(French Line)
Hamburg-America Line
N.V. Nederlandsch-Amerikaansche
Stoomvaart Maatschappij
(Holland-America Line)
Lykes Bros. Steamship Co. Inc.
North German Lloyd
Ozean/Stinnes Lines
Waterman Steamship
Corporation.

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331-204—69

QUESTION PRESENTED

Whether Sections 14b and 15 of the Shipping Act of 1916, as amended, 46 U.S.C. 813a, 814, apply to foreign-flag shipping lines which transport goods to American ports from points outside the United States.

STATUTE INVOLVED

P.L. 87–346, 75 Stat. 762, 46 U.S.C. 813a, 814, provides in part:

> An Act to amend the Shipping Act, 1916, as amended, to authorize ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees, and for other purposes.
>
> * * * the Shipping Act, 1916, is amended by adding after section 14a a new section to read as follows:
>
> "SEC. 14b. Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter 'Commission'), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof

will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to

be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. * * * Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. * * *"

SEC. 2. Section 15, Shipping Act, 1916, is amended to read as follows:

"* * * * *

"Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

SEC. 3. Notwithstanding the provisions of sections 14, 14b, and 15, Shipping Act, 1916, as amended by this Act, all existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, canceled, or modified by the Commission pursuant to the provisions of the Shipping Act, 1916, as amended by this Act: *Provided, however,* That all such existing agreements which are rendered unlawful by the provisions of such Act as hereby amended must be amended to comply with the provisions of such Act as hereby amended, and if such amendments are filed for approval within six months after the enactment of this Act, such agreements so amended shall be lawful for a further period of not to exceed one year after such filing. Within such year the Commission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act.

* * * * *

STATEMENT

The United States brought this action pursuant to Sections 14b and 15 of the Shipping Act of 1916, as amended, 46 U.S.C. 813a, 814, to recover penalties for violations of the Act by twelve shipping lines which

constituted the Continental-U.S.A. Gulf Westbound Freight Conference. This Conference was engaged in the carriage of cargo from Western Europe to United States Gulf of Mexico ports (Pet. App. 1–2). At all pertinent times the Conference employed a "dual-rate" contract system, under which shippers who agreed to tender to Conference carriers all of their cargo destined for the designated American ports paid a lower rate than other shippers (Pet. App. 3).

In response to this Court's decision that such contracts violated the Shipping Act (*Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481), Congress in 1961 in P.L. 87–346 amended the Act to authorize the Maritime Commission to permit the use of dual-rate contracts in American foreign commerce provided they contained the eight substantive provisions set out in the statute and any other provisions required by the Commission (see pp. 2–4, *supra*). The amendments provided that it "shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract" without the permission of the Commission (46 U.S.C. 813a) and that violators may be penalized up to $1000 "for each day such violation continues, to be recovered by the United States in a civil action" (46 U.S.C. 814).

Section 3 of the amending Act (P.L. 87–346) provided that dual-rate contracts which had been amended to comply with the terms of the new law and which were filed with the Commission within six months after its enactment would be lawful, without Commission approval, for a period not to exceed one year after filing (see p. 5, *supra*). The six-month

period for filing of amendments to existing contracts expired on April 3, 1962. However, the Conference continued to employ unamended dual-rate contracts until August 15, 1962, when it was dissolved, thereby terminating the unlawful contracts (Pet. App. 5).

The government brought this action for penalties based on the use of unlawful dual-rate contracts from April 3, 1962 until August 15, 1962. After the claim against the three American-flag lines was compromised, the nine foreign-flag lines moved unsuccessfully to dismiss the complaint for lack of jurisdiction over the subject matter. On interlocutory appeal (28 U.S.C. 1292(b)) from the district court's denial of that motion, the court of appeals affirmed (Pet. App. A). The court rejected petitioners' contention that subjecting them to liability under the Shipping Act would involve problems of extraterritorial application of American law because performance under the dual-rate contracts was completed abroad by the shippers' "tender" of cargo for carriage to American Gulf ports (Pet. App. 5–9). Noting that foreign-flag lines comprise the vast majority of the carriers in American foreign commerce, and that representatives of these lines had unsuccessfully objected to their being covered by P.L. 87–346, the court held that Congress had intended to penalize all shipowners, including petitioners, who operated in American foreign commerce without complying with American laws (Pet. App. 10–12).

ARGUMENT

The Shipping Act permits the use of certain dual-rate contracts "by any common carrier or conference of such carriers in foreign commerce." To "carry out" a contract without Commission approval is unlawful and subjects the carrier to penalties (46 U.S.C. 813a). The definitional section, 46 U.S.C. 801, provides: "The term 'common carrier by water in foreign commerce' means a common carrier * * * engaged in the transportation by water of passengers or property between the United States * * * and a foreign country, whether in the import or export trade * * *." Petitioners do not contend that they do not come within the literal language of the statute. Their principal argument is that Congress did not intend to regulate dual-rate contracts between foreign-flag lines and foreign shippers.

1. Contrary to petitioners' contention, the legislative history establishes that Congress intended the Act to apply to foreign shipowners operating in American foreign commerce. The Congress was aware that foreign-flag carriers dominated the conferences which used dual-rate contracts. See, *e.g.*, 107 Cong. Rec. 19343, 21144 (remarks of Senator Kefauver), 19343–44 (table showing that 57 out of 62 conferences using dual-rate contracts had a majority of foreign-flag lines). For this reason, it was considered necessary that "[t]he bill would not be limited in its application to our own ships, but *would apply to foreign vessels as well,* which are more numerous even in the trades in and out of U.S. ports" (H. Rep. No. 498, 87th Cong., 1st Sess., p. 45, emphasis added).

The foreign shipowners were fully represented at the hearings on P.L. 37–346. While they strongly favored legislation permitting the use of dual-rate contracts (*e.g.*, S. Rep. No. 860, 87th Cong., 1st Sess., p. 11), they were opposed to being covered by the Act's regulatory and penalty provisions.[1] Notwithstanding these objections, Congress enacted the provisions without change, leaving no doubt that foreign-flag shipping lines were covered by the legislation.[2]

---

[1] *E.g.*, S. Rep. No. 473, 87th Cong., 1st Sess., p. 5; 107 Cong. Rec. 19305 (remarks of Senator Engle); Hearings on H.R. 4299 Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries (hereafter "House Hearings"), 87th Cong., 1st Sess., p. 233). Mr. Leonard G. James, one of the attorneys for petitioners here, testified extensively in the hearings as counsel for the Committee of European Shipowners, of which most of the petitioners were members. House Hearings, pp. 166–167. He made it quite clear that his clients felt that "[e]ach provision of this bill relates to the activities of all of the carriers in our trades wherever those activities take place." Hearings on H.R. 6775 before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce (hereafter "Senate Hearings"), 87th Cong., 1st Sess., Part 1, p. 126.

[2] The legislative history set out in the petition (pp. 15–18) does show that Congress was attempting to aid American shippers. This does not detract from the fact that the Act covers both the import and export trade. See 46 U.S.C. 801.

Other portions of the legislative history support the government's view that Congress intended to cover carriers such as petitioners by this legislation. See Senate Hearings, Part 1, pp. 127, 128, 157; Senate Hearings, Part 2, pp. 235, 239–240, 243, 244, 250; House Hearings, pp. 168–169, 174, 183–196, 197, 199, 209, 234–237; S. Rep. No. 860, 87th Cong., 1st Sess., p. 30; 107 Cong. Rec. 19310.

2. Contrary to petitioners' assertion, there is no conflict in the treatment of the issue of extraterritorial application of American laws between the decisions below and *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (C.A. 2), in which the court held that Congress intended the antitrust laws to apply to conduct abroad which affected the commerce of the United States. In the instant case, the conduct which was the basis of the complaint and which is prohibited by the Act is the *employment* of unamended dual-rate contracts in *American* foreign commerce, *i.e.,* in commerce involving American ports. The court of appeals properly rejected petitioners' unpersuasive argument that the employment of their dual-rate contract system involved only conduct which was completed abroad by the tender of cargo to Conference carriers. That argument attempts to divorce the shipper's action in placing all his shipments with the Conference, which entitles him to the lower rates, from the main purpose of the agreement: to secure transportation of the goods to the United States. As the court of appeals pointed out (Pet. App. 8), the contracts themselves called for "transportation by [the carriers] to the United States through any port * * * in the Gulf of Mexico * * *." In view of the involvement of petitioners' contracts in American import trade, the decision below is fully consistent with the approach of the Second Circuit in *Alcoa.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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Attorneys.

JANUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT, U. S.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

Office-Supreme Court, U.S.
FILED
FEB 3 1969
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No. 875

ARMEMENT DEPPE, S.A.; COMPAGNIE MARITIME BELGE (LLOYD ROYAL), S.A.; COMPAGNIE GENERALE TRANSATLANTIQUE; HAMBURG AMERIKA LINIE; NORDDEUTSCHER LLOYD; OZEAN/STINNES LINIEN; N.V. NEDERLANDISCHE-AMERIKAANSCHE STOOMVART-MAATSCHAPPIJ "HOLLAND-AMERICA LIJN"; SVENSKA AMERICA LINIEN; and WILHELMSEN LINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO GOVERNMENT'S OPPOSITION

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 875

ARMEMENT DEPPE, S.A.; COMPAGNIE MARITIME BELGE (LLOYD ROYAL), S.A.; COMPAGNIE GENERALE TRANSATLANTIQUE; HAMBURG AMERIKA LINIE; NORDDEUTSCHER LLOYD; OZEAN/STINNES LINIEN; N.V. NEDERLANDISCHE-AMERIKAANSCHE STOOMVART-MAATSCHAPPIJ "HOLLAND-AMERICA LIJN"; SVENSKA AMERICA LINIEN; and WILHELMSEN LINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO GOVERNMENT'S OPPOSITION

Throughout these proceedings it has been the government's reiterated tactic to set up, as petitioners' alleged "major argument," a spurious, straw-man position which petitioners themselves have never advanced. The government "wins" this self-created dialogue, at each successive

stage, thus depriving petitioners of a fair hearing on the real issues involved. It is time enough that one Court consider the position which petitioners *do* advance, uncolored by inflammatory and false attributions from the other side.

The government in its Brief in Opposition herein goes to great lengths (in fact, its entire first argument; pp. 8-9) to establish the proposition that Congress, in passing the "dual rate" legislation (P.L. 87-346), "intended to cover" "foreign-flag shipping lines" as well as American. Unquestionably this is true, and petitioners have at no point contended otherwise.

Indeed, each of these petitioner carriers is a member of at least several other conferences, in other U.S. trades, and a party to their "dual rate contracts," *where the contracts are executed and performed in the United States,* either with American shippers (exporters) or with American consignees (importers). These petitioners have not questioned and do not question the application of P.L. 87-346 to any of their contracts with American exporters and/or importers. This case, however, involves *only* contracts with *European exporters.* That is the subject of the dispute and there is no other.

The fundamental jurisdictional issue raised is not "who," but "where."

Our argument would be unchanged had the three American lines, former co-members of the defunct Continental-U.S.A. Gulf Westbound Freight Conference, chosen to remain in the suit. Barring some legal quirk (which the government has not to date advanced) dependent entirely on those lines' U.S. identity and hence,

somehow, allegiance, it would remain our position that the "dual rate contracts" here in dispute remained beyond the jurisdiction and the intent of the United States Congress to control, in view of their execution and performance entirely outside the United States and the lack of any "reprehensible effect" in the United States. The foreign-flag nature of all nine of the petitioning lines heightens, to be sure, the extraordinary presumption of the Justice Department's extraterritorial claim. But no more. It is not the touchstone of the controversy.

It is not without significance that the Federal Maritime Commission—the very agency charged with the administration of the same Shipping Act of which the "dual rate" provisions are a part—has recently drawn precisely the same territorial regulatory line which petitioners urge here, and, significantly, against the loud protestations of the same Department of Justice, raising in that case an argument rather the converse of that which it invokes here. In a decision issued October 3, 1967, the Maritime Commission proclaimed, under Section 15 of the Act, jurisdiction over corporate mergers in the shipping industry. *Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Lines, Inc.*, 10 F.M.C. ...., Pike & Fischer, Shipping Regulation Reports, 9 S.R.R. 662 (1967). This assumption of jurisdiction was squarely sustained by the U.S. Court of Appeals for the Ninth Circuit a short month ago (though the case was remanded on other, subsidiary grounds). *Matson Navigation Co. v. Federal Martime Commission*, ... F.2d ....., Pike & Fischer, 8 S.R.R. 20,289 (9th Cir.; Dec. 18, 1968).

As an intervenor in both Commission and Court, the Department of Justice argued, against merger jurisdiction in the Commission, that since the literal terms of the statute cover foreign carriers as well as American, without distinction, yet since admittedly the Commission could not control mergers between foreign-flag operators, it necessarily followed that Congress had not intended to embrace merger agreements within Section 15, at all. The Commission rejected the argument, declaring:

> "But, say the parties, therein lies the fatal flaw in our reasoning because the language of Section 15 makes no distinction by flag or nationality among carriers subject to its requirements, and if we read into it such a distinction, we are doing violence to its very language and to our own principle that we regulate without regard to flag.
>
> "Section 17 from whence we draw our power to regulate the practice of terminals makes no distinction between domestic terminals and foreign terminals and a literal reading of the section would apply it to both. Yet, it has never been applied to a foreign terminal to exercise regulatory supervision over that terminal's practices. Nor is it likely that it would be. A reasonable construction of Section 15 would normally exclude foreign mergers from the coverage of its provisions just as it would include domestic mergers." 9 S.R.R. at 668.

The principle of statutory construction thus followed by the Commission, in acknowledging implied limitations on its jurisdiction, to reach agreements and activities consummated in the United States only, is firmly settled in decisions of this Court, and lower courts in conformance with them. See, for but some examples, *Foley Bros.*,

Inc. v. Filardo, 336 U.S. 281, 285, 93 L.Ed. 680 (1949); *McCulloch v. Marineros de Honduras,* 372 U.S. 10, 9 L.Ed. 2d 547 (1963); *Empresa Hondurena de Vapores, S.A. v. McLeod,* 300 F.2d 222 (2nd Cir. 1962); *Sociedad Nacional de Marineros de Honduras v. McCulloch,* 201 F.Supp. 82 (D.D.C. 1962), *affirmed,* 372 U.S. 10 (1963); also *Lauritzen v. Larsen,* 345 U.S. 571, 578, 97 L.Ed. 1254 (1953); *United States v. Freeman,* 239 U.S. 117, 119, 60 L.Ed. 172 (1915).

In the *Foley* case, *supra,* this Court denied the application of the U.S. "Eight-Hour Law" to work performed abroad, *even though* the work was performed under a contract with the U.S. government (a circumstance not present here). In the *McCulloch* cases, this Court and the lower courts of two Circuits reaffirmed the time-honored doctrine of forbearance in areas of maritime jurisprudence, set down in *Lauritzen v. Larsen,* against seeking to force one nation's parochial views on activities consummated wholly "outside the dominions of the sovereign power enacting" (345 U.S. at 578). Stated the Second Circuit, in language highly relevant to the government's contention here:

> "Literally the words cover the case. Yet the Board would hardly insist that the words apply to everything within their literal reach; we have not heard it suggested that the Board considers its power to extend to the stevedores who load Empresa's ships in Honduras although they are engaged in 'commerce' quite as much as the seamen who man them. Neither do we suppose the Board would think it could direct an election among miners employed by a wholly owned subsidiary of an American company abroad, even though the ore was shipped to the United States

> and American employees of the parent were objecting to what they regarded as unfair wage competition arising from lack of effective organization among the foreign miners, although again the words literally apply. Words are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage." *Empresa Hondurena de Vapores, S.A. v. McLeod,* 300 F.2d at 231.

In *United States v. Freeman, supra,* this Court sustained a statute making it a punishable offense to "ship or cause to be shipped from one state, . . . into any other state, . . . or from a foreign country into any state," any package containing intoxicating liquors, unless clearly marked as prescribed in the statute. It recognized that to save the single, unitary statute, the verb "to ship" must be given a different interpretation than its ordinary one—"to deliver to a carrier for shipment"—reasoning as follows:

> "The statute deals with shipping liquor from a foreign country into a state, as well as with shipping it from one state into another state. It puts both upon the same plane and makes them equally criminal. Whatever marks the completion of the offense in one likewise marks it in the other. If it be delivery to the carrier in the case of interstate shipments, it equally is this delivery in the case of shipments from a foreign country. *And yet all will concede that Congress did not intend to do anything so obviously futile as to denounce as criminal an act wholly done in a foreign country, such as the delivery to the carrier where the shipment is from a foreign country into a state.*" 239 U.S. at 120 (emphasis added).

No such need—nor room—for an unnatural construction of the word "tender," in the petitioners' dual-rate contracts with their customers in Europe, exists in this case; the words of the contract are unambiguous and clear in their meaning and intent. By the same token, P.L. 87-346 is fully enforceable, without need for a strained construction, as to all such contracts executed in the United States—whether in import or export trades. Notwithstanding, it is precisely the "obviously futile" construction for which the government contends here, where the contracts concerned cover only "tender" of cargo at European ports.

The controlling law laid down by this Court was reviewed and summarized recently by Senior Circuit Judge Medina in *United States v. Pizzaruzzo,* 388 F.2d 8 (2nd Cir. 1968). There Judge Medina noted the firmly settled law, in American jurisprudence, against the application of an American penal statute to foreign transactions that have no "detrimental effect" in the United States.

It is therefore not a question here whether P.L. 87-346 regulates foreign carriers, but rather, whether it regulates *the particular conduct* of foreign carriers *involved in the complaint,* namely, innocuous commercial transactions executed and performed wholly outside the United States.

A one-page second argument of the government's Brief follows the line of the Circuit Court below, in rejecting the clear language of the contracts here concerned, and the necessarily limited scope of their coverage, and of the rights and obligations thereunder. We have devoted considerable space in our Petition to the error of this strained reading, in fact, and error of the consequent

reasoning, in law; and to that will only add one final observation. The government's argument that what is "really" the "main purpose" of the contracts is to "secure transportation of the goods to the United States" overlooks the fact that what is being *punished* here is not the "transportation," nor even the "securing" of transportation, but simply the *terms of the tender* of cargo, abroad.*

It is, we submit, long past time that this case be decided on the true facts and issues which are genuinely presented; not on some extraneous red-herring issues dragged inappropriately in by the heels. Petitioners have not yet been heard on the bona fide issues in the case, principally because of the government's obscuring of them with false issues. The case is one of great international consequences. It should not be concluded on patently erroneous factual propositions.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GRAHAM & JAMES,

LEONARD G. JAMES,

F. CONGER FAWCETT,

Attorneys for Petitioners.

January, 1969

*The "dual rate contract" expires, by its own express terms, once shipper's tender and carrier's assignment of the lower freight rate has been accomplished. At that point, as pointed out in our Petition, other shipping documents and other contractual commitments take over.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 875

ARMEMENT DEPPE, S.A., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

At the request of the Department of State, I am transmitting a Note to it from the Embassy of Belgium relating to the above case. The Department of State also has requested me to inform the Court that it "takes no position on the views advanced in the Note and is transmitting the Note without comment." The views of the United States on this case are set forth in the brief in opposition already filed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1969.

333-691—69

AMBASSADE DE BELGIQUE

No. 663

The Embassy of Belgium presents its compliments to the Department of State and, on instructions from his Government, and on behalf of the Governments of Belgium, France, the Federal Republic of Germany, Netherlands, Norway and Sweden, has the honour to draw the attention of the Department of State to the civil action, which in October 1963 was brought by the United States in the District Court for the Eastern District of Louisiana against the former members of the Continental United States Gulf Westbound Freight Conference for alleged violations of Sections 14(b) and 15 of the Shipping Act of 1916, for having failed to amend their dual rate contracts with shippers as required by Section 14(b) of the Shipping Act and to obtain approval of these amendments by the Federal Maritime Commission.

In February 1964 the European former members of the Conference moved to dismiss for lack of jurisdiction over the subject matter. After the denial of this motion by the District Court an interlocutory appeal from this denial was made to the United States Court of Appeals for the Fifth Circuit, which Court however, affirmed the denial.

On 23 December 1968 a petition for certiorari regarding the decision of the Court of Appeals was filed with the United States Supreme Court.

The United States Government will be aware that in April 1964 various of the above-mentioned Governments submitted notes to the State Department containing their views on this case; and on 13 April 1964 all the above Governments, in conjunction with the Governments of Denmark, Greece, Italy, Japan and the United Kingdom, drew the attention of the United States Government to their strong objections to its attempts unilaterally to impose on Conferences its views concerning the provisions of dual rate contracts which the eleven Governments considered came within their jurisdiction. In this particular case, the dual rate contracts of the Continental United States Gulf Westbound Freight Conference were made and performed within jurisdictions other than that of the United States and were valid and enforceable under the laws of those jurisdictions. In the view of the above six Governments the application of conflicting United States laws to these contracts resulting in an action to impose penalties for a failure to cancel the contracts infringes their jurisdiction. They express the hope that the Supreme Court of the United States will hear the case and in its consideration recognize the interests and jurisdictional rights which in their view are based on international law and accepted international practice.

The Embassy of Belgium also wishes to say, on behalf of the Governments of Denmark, Finland, Greece, Japan and the United Kingdom, that they are aware of this approach and fully support the principles in pursuance of which it is being made.

All the above Governments would be grateful if the Department of State would bring the contents of this note to the knowledge of the appropriate American authorities.

WASHINGTON, D.C., *February 5, 1969.*

THE DEPARTMENT OF STATE,
Washington, D.C.

U.S. GOVERNMENT PRINTING OFFICE: 1969